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No. 76-1510

In the Supreme Court of the United States

OCTOBER TERM, 1977

RAYMOND W. GRABER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The court of appeals affirmed without opinion (Pet. App. C). The opinions of the district court (Pet. Apps. A and B) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1977. The petition for a writ of certiorari was filed on April 30, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner received effective assistance of counsel at trial.

2. Whether petitioner knowingly and voluntarily waived his right to a trial by jury.

3. Whether petitioner's answers to questions before the grand jury were literally true (although unresponsive) and thus not perjurious as a matter of law.

STATEMENT

Following a jury-waived trial in the United States District Court for the Eastern District of New York, petitioner was convicted of perjury before a federal grand jury, in violation of 18 U.S.C. 1623. Imposition of sentence of imprisonment was suspended, and he was placed on probation for three years and fined $1,000. The court of appeals affirmed (Pet. App. C).

1. In January 1975, a grand jury in the Eastern District of New York commenced an investigation of possible violations of 18 U.S.C. 241 and 242 (Civil Rights Act) and 18 U.S.C. 1951 (Hobbs Act) in Hempstead (Nassau County), New York. Among the subjects the grand jury investigated were whether local government employees in Hempstead, Long Island, were expected to contribute one percent of their annual wages to the town's Republican Finance Committee, and if so, whether such contributions were voluntarily made. During the course of its investigation, the grand jury questioned over 300 employees, including some from the Department of Conservation and Waterways. Petitioner, formerly the Administrative Assistant and later the Deputy Commissioner of that Department, was questioned by the grand jury in order to determine whether he solicited and collected one percent contributions from fellow employees (Pet. App. 1a-2a).

Petitioner appeared before the grand jury on July 11, 1975. Prior to this appearance, petitioner was advised of his privilege against compulsory self-incrimination and informed by government counsel of the scope of the grand jury investigation, of the general nature

of the prior testimony of his employees and of the fact that he was a potential target of the grand jury's investigation and could be indicted (Tr. 70, 72-74; see Pet. App. 3a-4a). Petitioner then testified that all he knew about the "one percent system" was what he read in the newspapers (Pet. App. 5a). As the district court found (Pet. App. 7a), petitioner stated in substance "that he acted in each and every year after 1966 as the transmitter of contributions, but would not have been so presumptuous as to say to anyone 'you should give one percent.' "[1]

2. The evidence at trial showed that, contrary to petitioner's disclaimers before the grand jury, every year from 1968 through 1974 he actively solicited and collected one percent contributions from his employees (Tr. 116-120, 141, 144-145, 173-177, 363-371) and instructed supervisory personnel to do the same (Tr. 190-191). Employees who failed to make their contribution were told to see petitioner (Tr. 249). Petitioner, on his own initiative, prepared cards to solicit and collect the contributions (Tr. 193-195, 204, 212, 226, 248, 316). In 1973 the lists and cards prepared and distributed by petitioner contained figures representing one percent of the annual salaries of each of the employees (Tr. 229, 287-289, 345, 348).

The evidence further showed that petitioner attempted to institute a policy whereby any employee who did not make a contribution would not receive overtime (Tr. 190-191), that he instructed a supervisor to remove an employee from overtime because of his failure to contribute (Tr. 313-315), and that he told an employee that if he wanted

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[1]The precise questions and answers are set forth at pp. 10-12, *infra*.

a better job, he would be expected to pay his one percent (Tr. 366, 369-370).[2]

ARGUMENT

1. Petitioner contends (Pet. 9-16) that his retained counsel's performance in the trial of this case constituted a denial of his right to effective assistance of counsel. There is, as petitioner notes (Pet. 9-10), an apparent divergence of views among the circuits as to the proper standard for testing such claims. Several circuits recently have rejected the traditional "farce and mockery" test (*e.g.*, *Beasley* v. *United States*, 491 F. 2d 687 (C.A. 6); *United States* v. *De Coster*, 487 F. 2d 1197 (C.A. D.C.); *West* v. *Louisiana*, 478 F. 2d 1026 (C.A. 5), vacated in part and remanded, 510 F. 2d 363; cf. *United States* v. *Yanisfsky*, 500 F. 2d 1327, 1333, n. 2 (C.A. 2)) and in its stead have adopted a standard of "reasonableness" that they consider to be less stringent. But even if the existing difference among the circuits otherwise constitutes a significant conflict concerning the constitutional minimum, petitioner's representation at trial was competent and constitutionally adequate under any of the standards. Cf. *Dunker* v. *Vinzant*, 505 F. 2d 503 (C.A. 1), certiorari denied, 421 U.S. 1003. As the district court found after a thorough review of the issue (Pet. App. 27a), petitioner's counsel represented him "very effectively." Since counsel's performance in this case was well "within the range of competence demanded of attorneys in criminal cases" (*McMann* v. *Richardson*, 397 U.S. 759, 771), this case presents no occasion for the resolution of differences that may exist in the general standards enunciated by the courts of appeals.

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[2]After the employee made the contribution he received a better job (Tr. 363-371).

a. In particular, contrary to petitioner's assertions (Pet. 11-14), the fact that petitioner's counsel also represented three other individuals who were separately tried for their own perjury did not raise a substantial possibility of a conflict of interest before trial or cause an actual conflict during trial. At petitioner's arraignment the court asked his counsel if it was "utterly safe" for him to represent all four defendants (A. 9a, 12a-13a).[3] Petitioner's counsel responded that he saw "no conflict whatsoever" inasmuch as the individuals were not being tried together, did not work with each other, and individually chose him to represent them (*ibid.*).

It is true that petitioner's counsel later wrote a letter to the court in which he stated that "it is patent that there is a real possibility that there is a conflict of interest" and that he was making arrangements for separate counsel to represent petitioner and two other defendants (A. 15a-16a). But this claim was never elaborated or pursued by petitioner's counsel, and on this record it is difficult to envisage an actual conflict. Petitioner was tried for his own perjury. He was tried alone and was not charged with being a party with others in a criminal venture. There was no question of ascribing more blame to him than to others, and petitioner has failed to suggest any concrete way in which the alleged conflict prevented his counsel from representing him vigorously and without reservation. Petitioner's argument in this regard thus rests upon unfounded speculation and affords no basis for holding that the district court should *sua sponte* have precluded petitioner's retained counsel from representing him.[4]

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[3]"A." refers to petitioner's appendix in the court of appeals.

[4]This case therefore is not comparable to *Holloway* v. *Arkansas*, No. 76-5856, certiorari granted, April 18, 1977, upon which petitioner relies. In *Holloway*, in sharp contrast to this case, three defendants being

b. Petitioner contends further (Pet. 4) that his counsel met with him too infrequently and that they were unable to work together. Of course, counsel's actual performance at trial, and not the extent of contact between counsel and client prior to trial, is the proper measure of counsel's effectiveness. See *Wojtowicz* v. *United States*, 550 F. 2d 786 (C.A. 2). The record shows, in any event, that prior to trial defense counsel met with petitioner on three occasions and that a paralegal assistant to defense counsel met with petitioner several times (A. 86a). Petitioner's counsel also conferred with petitioner for an additional 15 hours between September 8 and September 13 to prepare him to testify (Tr. 458).

There apparently were differences of opinion between petitioner and his counsel prior to trial, but these were resolved before the trial began and did not impair the effectiveness of counsel's representation. The record shows plainly that petitioner and counsel formed an attorney-client relationship and conferred continuously throughout trial. Referring to earlier differences, petitioner stated at the beginning of the trial (Tr. 49):

> Your Hnor [sic], last week, as a result of perhaps experiencing the most traumatic event of my life, I guess I didn't have it all together. I do have an attorney-client relationship at this time. Mr. Sutter and myself had a few friendly chats, brief chats via telephone from my home to Connecticit

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jointly tried for rape and robbery twice moved for separate counsel on the ground that they might present conflicting defenses; moreover, their appointed counsel had pointed out that each of his clients planned to take the stand, and that he would be unable, consistent with his obligation to all three, to cross-examine any one of them on behalf of the others. The questions thus presented by these circumstances have no bearing upon the markedly different circumstances of this case.

> [sic] over the long holiday weekend. I think I understand things a little better now.

Nevertheless, petitioner now claims (Pet. 12-15) that he did not receive effective assistance because counsel demeaned him throughout the trial. But the district court considered and correctly rejected this contention, noting that such comments formed a part of the trial strategy (Pet. App. 26a):

> I thought that two things were being done with respect to the defense of this case. One was to make sharp and clear the legal point first. And it was a two fold legal point. First, that the answers that [petitioner] gave were not solid answers before the Grand Jury and could not as a matter of law be the foundation of a perjury indictment. Second, that as a—the transcript shows he was distraught. He is a man of a certain quality of nervous disability which doesn't impair his usefulness as a worker or anything else, but peculiarly unfits him either to be a Grand Jury witness or a trial court defendant. And that appeared, to some extent, from the transcript of the Grand Jury proceedings and in all depths at the trial, at every occasion counsel pressed on the attention of the Court the man's mental frailty—not a disabling frailty, but one peculiarly unfitting him to stand the rigors of testifying in Court, testifying before the Grand Jury. So that by the time [petitioner] took the witness stand, I was supposed to take from his testimony what was good and discount to nervousness what was bad. That was a—the calculated part of this able lawyer's method of representing the defendant, that the seemingly derogatory remarks were attempted to [in]doctrinate me to believe—and I think that is reflected

in these memoranda—believe that he was not equal to these legal cases.[5]

c. The record as a whole supports the district court's finding (Pet. App. 27a) that petitioner's counsel represented him "very effectively." Counsel had "a rational trial plan" (Pet. App. 28a), conducted extensive cross-examination of the government's witnesses, developed a plausible theory of defense, and effectively summarized the evidence and his theory of the case during final argument. His decision not to call certain witnesses and his characterization of petitioner throughout trial represent tactical decisions that were well within the standard of reasonableness. Petitioner's belief, formed with the benefit of hindsight and new counsel, that his former counsel's strategy was unwise is not a sufficient basis for reversal of his conviction.

2. Petitioner also contends (Pet. 17-18) that his waiver of a jury trial, made in writing and in open court, was not intelligently made because of his physical and mental condition, and that the trial judge should have addressed him directly on the question of waiver.[6] It may be the better

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[5]Petitioner complains that many of these comments were made at side bar conferences. With respect to side bar conferences, the district court said (Pet. App. 25a):

> Now, I do realize that [petitioner] did not come up to the side bar. My own practice is never to exclude clients from side bars if they want to comeup. Ordinarily they come to the first one or two and not thereafter. They find them, as they usually are, rather dry discussions. There was no exclusion of [petitioner] from the side bar discussions in the remotest respect.

[6]Petitioner's additional contention that the report of the doctor who examined him pursuant to 18 U.S.C. 4244 should have been made part of the record is insubstantial. There is no requirement in the statute that such report must be included in the record. Moreover, petitioner did not request the report's inclusion in the record by the district court, did not

practice for a trial judge, "when advised by a defendant that he desires to waive his right to a jury trial, to interrogate the defendant so as to satisfy himself that the defendant is fully apprised of his rights and freely and voluntarily desires to relinquish them." *United States* v. *Hunt*, 413 F. 2d 983, 984 (C.A. 4). But petitioner's assertion that there is "no evidence in the record from which it could be ascertained on review that the waiver was voluntary" (Pet. 17) misses the point. Fed. R. Crim. P. 23(a) provides that a waiver of a jury trial must be "in writing with the approval of the court and the consent of the government," and these conditions were fulfilled in this case. "The record [thus] is silent only to the extent that it fails to contain any suggestion that * * * [his] waiver was anything but voluntarily and intelligently entered." *United States* v. *Mitchell*, 427 F. 2d 1280, 1281 (C.A. 3). Petitioner does not now argue and has never argued that his decision to waive a jury was coerced (see *Dranow* v. *United States*, 325 F. 2d 481, 483-485 (C.A. 8)) or that he failed to comprehend the gravity of his offense. *Riadon* v. *United States*, 274 F. 2d 304 (C.A. 6).

The record shows that on August 31, 1976, petitioner's counsel informed the court that he had spent an hour with petitioner advising him of his right to a trial by jury and that, after this consultation, petitioner had agreed that he should waive his right to a jury trial because his case basically involved questions of law, not fact (A. 19a-20a). On September 2, 1976, counsel and petitioner informed the court that petitioner still wanted to waive his right to a jury (A. 110a). On September 7, 1976,

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argue on appeal that the failure to include it deprived him of any right, and has at no time challenged the report's conclusion that he was competent to stand trial. Nor has he suggested that the report could support his argument that his waiver of jury trial was not knowingly and voluntarily executed.

petitioner's waiver of jury trial was presented to the court and accepted (A. 118a-119a). In these circumstances the district court properly accepted the formally executed waiver of trial by jury (see Pet. App. 27a-28a).[7]

3. Petitioner gave the following testimony before the grand jury, which was alleged in the indictment to have been willfully false (Pet. App. 7a-9a; A. 5a-8a):

> Q. * * *Now, did you play any role within your department in actively soliciting these contributions from employees under you at any time?
>
> A. * * *Each and every* * *year [after 1966], I was the transmitter.* * * I would never be so presumptuous in the community even if I knew a a man was—to say, "you ought to give five dollars or ten dollars." Neither would I be so presumptuous to say to anybody that, "You should give one percent."* * *
>
> * * * * *
>
> Q. A number of employees have testified that you would come around and give them a three-by-five or a similar card on which it would have

[7] *United States* v. *David*, 511 F. 2d 355 (C.A. D.C.), upon which petitioner relies, is not to the contrary. In *David*, the defendant had a substantial psychiatric history, had been found by a psychiatrist to be incompetent to stand trial, and had been evaluated by his counsel as possibly incompetent to waive his jury trial right. In these circumstances, the judge's mere inquiry of defendant whether he understood that he had a right to a jury and whether he relied upon his attorney's advice was held insufficient to establish that he made a knowing and intelligent waiver of jury trial. Here, in contrast, as the district court observed (Pet. App. 25a), petitioner had "command of his own mind" and "his own recollection." He was found to be competent to assist in the conduct of his trial, including the decision to dispense with a jury. Moreover, throughout the pretrial hearings he manifested his desire, consistent with his counsel's advice, to waive his right to a jury trial.

> their name, their salary, and a handwritten notation somewhere on the card which was a figure representing one percent of their salary. Now, first of all, has that occurred?
>
> A. No, not in the manner and the way that you said it.
>
> Q. All right. Would you relate your recollection?
>
> A. * * * I have previously stated that comes August or September and 95% to 98% of the department I am with, employees are in hinterland buildings scattered all over. I rarely see them. I have no direct communication with them. I have never solicited them. Okay? But as August and September come around, individuals and supervisors start calling up or coming in and believe it or not, sir, many of them * * * do not know their annual salary. If someone asks for their annual salary, they will get it.
>
> Q. All right. And then you write it down?
>
> A. If somebody will ask either in person or by phone, "Will you figure out one percent for me" * * * I will have one of the girls write it out for them.* * *
>
> Q. And then do you give it to them?
>
> A. I have given it to individuals and in some cases to their supervisors when they took the initiative and asked me for it.
>
> * * * * *
>
> Q. So from the standpoint of what you've just said, she [the secretary] would prepare the card for everyone in the department and then hold them so that they would be available if the individual requested it.

A. Yes. But somewhere along the way, we have received so many phone calls or so many requests, that I did give some to some supervisors with these instructions * * *. "* * *They are only to be given to a man if he asks you a question which specifically can be answered by you." And there was no one percent figure on those cards.

Petitioner contends (Pet. 18-19) that the foregoing responses were literally truthful (although perhaps nonresponsive) and thus not perjurious as a matter of law under *Bronston* v. *United States*, 409 U.S. 352. But *Bronston* was a quite different case. There the defendant appeared before the grand jury and, when asked if he had ever had a bank account in Swiss banks, testified "[t]he company had an account there for about six months, in Zurich." 409 U.S. at 354. The evidence at trial established that for nearly five years Bronston had a personal account in a Swiss bank. This Court reversed his conviction for perjury and found that Bronston's answer before the grand jury was literally true. Although there was an implication in the answer that Bronston had never had a personal account, this Court concluded that "literally true but unresponsive answer[s] are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution." 409 U.S. at 362.

Here, in contrast, petitioner plainly denied that he had solicited contributions and distributed unsolicited cards bearing the one percent figure—assertions wholly refuted by the evidence. Although his answers were rambling, they were neither unresponsive nor literally truthful. See *United States* v. *Bonacorsa*, 528 F. 2d 1218, 1221 (C.A. 2), certiorari denied, 426 U.S. 935. As the district court aptly observed (Pet. App. 23a):

> [T]he defendant's answers, while discursive and circumstantial, were precisely responsive. They depicted his role; they conveyed very complete answers to the questions asked. The answers he gave could not have been deprived of their content as responsive and untrue by any words that the defendant could have added to them short of total and explicit recantation before the Grand Jury of the substance of the answers given.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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